ADJUSTMENT OF STATUS & WAIVERS OF INADMISSIBILITY

I. **Introduction**

A. Brief Overview

1. "Adjustment of status" is a term of art used for the process of applying for permanent resident status inside the United States. If an applicant for permanent resident status is outside of the United States, then the correct term is "consular processing."
2. The majority of the time, applicants file for adjustment affirmatively, which is before the United States Citizenship and Immigration Services(USCIS). Once an individual is placed in removal proceedings, jurisdiction shifts to the Immigration Judge, unless they are charged as an arriving alien.
3. The process of adjustment usually begins with an immigrant visa petition filed on behalf of the applicant by either a family member or an employer, whether the applicant is inside or outside the United States. USCIS has sole jurisdiction to adjudicate this petition and classify the applicant under the appropriate category of family- or employment-based visas. Immediate relatives are exempt from the quota restrictions; everyone else must wait in line.
4. Once a visa is immediately available, the applicant may file their application for adjustment of status. At this point, the applicant is screened for inadmissibility. If inadmissible, an applicant must file an appropriate waiver to become eligible to adjust status.

B. Common Abbreviations

1. AggFel/AF – Aggravated Felony
2. AoS/AOS – Adjustment of Status
3. CIMT – Crime Involving Moral Turpitude
4. CSPA – Child Status Protection Act
5. DACA – Deferred Action for Childhood Arrivals
6. DHS – Department of Homeland Security
7. EWI – Entered Without Inspection
8. IJ – Immigration Judge
9. IIRAIRA – Illegal Immigration Reform and Responsibility Act of 1996
10. Jx – Jurisdiction
11. LPR – Lawful Permanent Resident
12. QR – Qualifying Relative (or Qualified Representative in the Franco context)
13. SIJS – Special Immigrant Juvenile Status
14. TPS – Temporary Protected Status
15. UAC – Unaccompanied Minor
16. USC – United States Citizen
17. USCIS/CIS – United States Citizenship and Immigration Services
18. VAWA – Violence Against Women Act

C. Common Forms

1. Form I-94 – Arrival/Departure Record
2. Form I-130 – Petition for Alien Relative
3. Form I-140 – Immigrant Petition for Alien Workers

4. Form I-360 – Petition for Amerasian, Widow(er), or Special Immigrant
5. Form I-485 – Application to Register Permanent Residence or Adjust Status
6. Form I-601 – Application for Waiver of Grounds of Inadmissibility
7. Form I-797 – Notice of Action (when application or petition is approved)
8. Form I-864 – Affidavit of Support

II. **Jurisdiction**

A. Jurisdiction Before IJ – INA § 1245.2(a)(1)

1. Generally, the IJ has jurisdiction if an applicant is in removal proceedings, even if the proceedings have been administratively closed or if there is a final order of deportation or removal that has not yet been executed.
2. The IJ does not have jurisdiction over applications filed during proceedings if the applicant is determined to be an "arriving alien."
   a. Exception (8 C.F.R. § 1245.2(a)(1)(ii)(A)–(D))
      i. The applicant, charged as an arriving alien, properly filed the application for adjustment of status with USCIS while he or she was in the United States;
      ii. The alien departed from and returned to the U.S. pursuant to the terms of a grant of advance parole to pursue the previously filed application for adjustment of status;
      iii. The application for adjustment of status was denied by USCIS; and
      iv. DHS placed the arriving alien in removal proceedings either upon the arriving alien's return to the U.S. pursuant to the grant of advance parole or after USCIS denied the application.

III. **Threshold Eligibility for Adjustment of Status**

A. Statutory Definition – INA § 245(a)

1. "The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed."

B. Simplified

1. Applicants must:
   a. Have been inspected and admitted or paroled (except VAWA self-petitioners);
   b. Be eligible and admissible for permanent residence; and
   c. Have an immigrant visa number must be immediately available to him/her.

C. Inspected and Admitted or Paroled

1. What is an "admission?"
   a. An admission is a "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A).

b. Individuals who enter without inspection (EWI) are deemed inadmissible under INA § 212(a)(6)(A)(i). *See also* 8 C.F.R. § 235.1(f)(2).
c. Traditionally, AoS was deemed an "admission" by the BIA; however, in light of nine circuits holding that AoS was not an "admission," the BIA reversed course in *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015). This had important implications for some LPRs in removal proceedings. For example, as will be discussed below, because AoS was previously deemed an admission, LPRs were ineligible for applying for 212(h) waivers. *See Matter of Chavez-Alvarez*, 26 I&N Dec. 274 (BIA 2014), *rev'd on other grounds*, *Chavez-Alvarez v. U.S. Att'y Gen.*, 783 F.3d 478 (3d Cir. 2015).
d. Waved-In: A noncitizen may be deemed "admitted" without being questioned by an immigration officer or being admitted in a particular status; it only requires a showing of "procedural regularity." *Matter of Quilantan*, 25 I&N Dec. 285, 289 (BIA 2010).
e. Note: A person may be considered "inspected and admitted" even if inadmissible and/or presenting false documents at the border. *See generally Sum v. Holder*, 602, F.3d 1092 (9th Cir. 2010); *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir. 2008); *Matter of Pena*, 26 I&N Dec. 613 (2015).

2. What is "paroled?"
   a. Parole may be granted to a noncitizen outside the country to allow him or her to apply for admission but are either inadmissible or do not have a legal basis for admission. *See* INA § 212(d)(5)(A).
   b. Parole is not an admission. INA § 101(a)(13)(B) ("An alien who is paroled . . . shall not be considered to have been admitted."); 212(d)(5)(A) ("[P]arole of [an] alien shall not be regarded as an admission . . . .").
   c. Advance Parole – Allows a noncitizen to leave the U.S. without jeopardizing his or her immigration status. Eligible applicants for advance parole include TPS and DACA recipients, who use this advance parole to cure their EWI in order to become eligible for adjustment. However, since August 17, 2018, the government is no longer accepting applications for advance parole during pending litigation on the DACA program as a whole.
      i. If an applicant departs the U.S. during the pendency of his or her adjustment application, their application is considered abandoned without an advance parole document. 8 C.F.R. §§ 1245.2(a)(4)(ii).
   d. Parole in Place – Usually, a noncitizen can only be paroled in while outside the United States. In theory, DHS has the authority to parole a person on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit" if the noncitizen entered without inspection. INA § 212(d)(5)(A). In effect, that noncitizen who previously entered without inspection is "paroled" without having to depart and trigger unlawful presence bars, and no longer barred from adjustment on the basis of being inadmissible. Most common use is to parole-in-place spouses, children, and parents of persons in the armed forces.

3. Proving Admission or Parole

a. Documentary Evidence
    i. Form I-94
    ii. Passport with admission stamp
    iii. Other entry document, such as border crossing card
b. Applicant's Testimony

D. Eligible for a Visa & Admissible
1. An applicant for admission cannot be inadmissible under INA § 212(a).
2. Select Grounds of Inadmissibility
    a. Health Related Grounds – INA § 212(a)(1)(A)
    b. Criminal & Related Grounds – INA § 212(a)(2)
    c. Public Charge – INA § 212(a)(4)
    d. Labor Certification – INA § 212(a)(5)
    e. Illegal Entrants & Immigration Violators – INA § 212(a)(6)
    f. Documents Requirements – INA § 212(a)(7)(A)
    g. Previous Removal or Unlawful Presence – INA § 212(a)(9)
3. If an applicant is subject to a ground of inadmissibility, he or she must be eligible for a corresponding waiver to become eligible to adjust. (Waivers discussed further below)
4. See section titled "Grounds of Disqualification for Adjustment of Status" for further discussion on Eligibility.

E. Visa Immediately Available
1. Basically, this means either that the priority date is current or that the applicant is immigrating in a category for which there is no waiting list. Think of it like waiting for your number to be called at a deli.
2. Immediate Relatives: Spouses, parents, and children of USCs are exempt from immigration quota restrictions, i.e., their visas are immediately available. *See* INA § 201(b)(2)(A)(i).
    a. Definition of Child – The INA has a lengthy definition for who qualifies as a child for purposes of AoS; however, any "child" has to be unmarried and under 21 y/o. Below, are the main categories to remember:
        i. Child born in wedlock – INA § 101(b)(1)(A)
        ii. Child born out of wedlock – INA § 101(b)(1)(D)
        iii. Step Child – INA § 101(b)(1)(B)
        iv. Legitimated Child – INA § 101(b)(1)(C)
        v. Adopted Child – INA § 101(b)(1)(E)
        vi. Orphans – INA § 101(b)(1)(F)
    b. Note: Even though an individual may be considered an adult under state law at 18 y/o, he or she may still meet the immigration definition of a child up until 21 y/o, as long as he or she does not marry.
    c. CSPA: allows children who turn 21 y/o during immigration process to continue to be treated as children to avoid being "aged out" and separated from their families.
3. If not an immediate relative, where to find the priority date?

a. The priority date is the date the visa petition was filed with USCIS and can be found on the Form I-797, notifying the petitioner/applicant of approval.

4. How to tell if priority date is current?
   a. Monthly Visa Bulletin
      i. Family-Based Preferences
         - F1 – Unmarried Sons and Daughters of U.S. Citizens
         - F2A – Spouses and Children of Permanent Residents
         - F2B – Unmarried Sons and Daughters (21 years of age or older) of Permanent Residents
         - F3 – Married Sons and Daughters of U.S. Citizens
         - F4 – Brothers and Sisters of Adult U.S. Citizens
      ii. Employment-Based Preferences
         - First – Priority Workers
         - Second – Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability
         - Third – Skilled Workers, Professionals, and Other Workers
         - Fourth – Certain Special Immigrants
         - Fifth – Employment Creation
5. For preference immigrants, the visa must be available at the time the adjustment application is filed.
6. It is possible for the visa to become unavailable after the adjustment application is filed. However, a visa must also be available at the time the adjustment application is adjudicated.

IV. Grounds of Disqualification for Adjustment of Status

A. Under INA § 245(c), a noncitizen is ineligible to adjust under INA § 245(a) if he/she:
   1. Is an alien crewman (unless VAWA self-petitioner);
   2. Except for immediate relatives and special immigrants described in INA § 101(a)(27)(H)–(K), a noncitizen who:
      a. Continues in or accepts unauthorized employment prior to filing an application for AoS;
      b. Is in unlawful immigration status on the date of filing the application for AoS; or
      c. Has failed (other than through no fault of their own or for technical reasons) to maintain continuously a lawful status since entry into the U.S.
   3. Was admitted in transit without a visa under INA § 212(d)(4)(C);
   4. Was admitted as nonimmigrant visitor without a visa under INA §§ 212(l), 217, except for immediate relatives;
   5. Was admitted as a nonimmigrant described in INA § 101(a)(15)(S) (criminal informants);
   6. Is deportable under INA § 237(a)(4)(B) (terrorist activities);
   7. Seeks AoS to that of an immigrant under INA § 203(b) and is not in a lawful nonimmigrant status; or
   8. Was employed while he/she was an unauthorized alien, as defined in INA § 274A(h)(3), or has otherwise violated the terms of a nonimmigrant visa.

B. Note: These grounds of disqualification are why family-based adjustment is generally limited to immediate relatives and those grandfathered in under INA § 245(i) (discussed further below). The only ground that applies to immediate relatives is entry as a crewman.
    1. Further Explanation: Many of the visa preferences are backlogged, resulting in some noncitizens having to wait months or years to become current. If they do not have employment authorization, it is difficult for those that are waiting to go that long without work or to maintain their nonimmigrant status.
C. Practice Tip: An initial focus on INA § 245(c) may be the quickest way to resolve the question of eligibility for AoS, without having to unnecessarily delve into more complex issues.

V. **Special Immigrant Juvenile Status (SIJS)**

A. Definition: *See* INA § 101(a)(27)(J)(i)–(ii).
    1. Covers a child:
        a. Who is under the age of 21 on the date of filing the Form I-360;
        b. Who has been declared a dependent by a juvenile court in the U.S., or who has been placed by such court in custody of a state agency or other individual entity;
        c. Whose reunification with one or both of his or her parents is not viable due to abuse, abandonment, neglect, or a similar basis found under state law; and
        d. In whose best interest it is to not be returned to his or her parents' country of nationality or last habitual residence.
B. Individuals adjusting through SIJS are deemed paroled into the country and need not show admission and inspection. INA § 245(h)(1).
C. The following grounds of inadmissibility do not apply:
    1. INA § 212(a)(4) (Public Charge), (5)(A) (Labor Certification and Qualifications for Certain Immigrants), (6)(A) (Aliens Present Without Admission or Parole), (6)(C) (Fraud or Willful Misrepresentation of Material Fact), (6)(D) (Stowaways), (7)(A) (Not in Possession of Valid Entry Document), and (9)(B) (Unlawfully Present)
D. The second ground of disqualification under INA § 245(c), discussed above, does not apply to SIJS.

VI. **Forgiveness Provisions**

A. INA § 245 contains two provisions that enable people to adjust status who would otherwise by disqualified due to entry without inspection, failure to maintain nonimmigrant status, and/or unauthorized employment.
B. <u>INA § 245(i)</u>
    1. Those that are eligible for benefits under INA § 245(i) are considered grandfathered in.
    2. Qualifications:
        a. Must be a beneficiary of a labor certification or visa petition under INA § 204 that was filed on or before January 14, 1998; or

b. Must be a beneficiary of a labor certification or visa petition that was filed after January 14, 1998, but on or before April 30, 2001, *and he or she was physically present in the U.S. on December 21, 2000*.
    i. Note: A petition or labor certification must have been "approvable" when filed. *See Matter of Butt*, 26 I&N Dec. 108, 111–17 (BIA 2013).
3. Two Categories of Grandfathered Aliens:
    a. Principal Grandfathered Aliens – principal beneficiaries of qualifying visa petitions and labor certifications
    b. Derivative Grandfathered Aliens – dependent spouses and children of principal grandfathered aliens (if eligible to receive visa under INA § 203(d))
        i. As long as the spousal or child relationship was established prior to the April 30, 2001 sunset date, a subsequent change in circumstances, such as death or divorce, does not terminate grandfathered status. *See Matter of Estrada*, 26 I&N Dec. 180, 185–86 (BIA 2013).
4. Penalty: This forgiveness provision is subject to a $1000 penalty, which is not required for children under 17. 8 C.F.R. § 103.7(b)(1). However, the penalty may not be waived by an IJ. *See Matter of Fesale*, 21 I&N Dec. 114 (BIA 1995).
5. Note: INA § 245(i) does not waive inadmissibility; INA § 212(a) applies in full.

C. <u>INA § 245(k)</u>
1. Applies only to employment-based adjustment cases.
2. Qualifications: It applies to people who, on the date of filing the adjustment application:
    a. Have made a lawful entry, and
    b. Thereafter, have not, for more than 180 days, failed to maintain status, engaged in unauthorized work, or otherwise violated the terms and conditions of admission.

VII. **Derivatives: Family Members of Adjustment Applicants**

A. Derivatives = spouses and children of the principal applicant
B. All of the preference categories, in both the family- and employment-based preferences, include derivatives.
C. Immediate relatives do not have derivatives. It may go without saying, but, if the immediate relative is the spouse of a USC, they would not be claiming another spouse as a derivative. The real issue arises with children. If the immediate relative spouse has a child, the child must be the beneficiary of a separate petition because he/she is not a derivative.
    1. Exception: Children of VAWA self-petitioners are derivatives. 8 C.F.R. § 204.2(c)(4).
D. Each derivative must individually meet the eligibility requirements of INA § 245(a) and must not be disqualified under the grounds listed in INA § 245(c) or be inadmissible under INA § 212(a). As with principals, a derivative's inadmissibility could be cured by an appropriate waiver.

VIII. **Discretion**

A. AoS is a discretionary remedy. *See generally Matter of Arai*, 13 I&N Dec. 494 (BIA 1970). However, case law makes clear that adjustment should ordinarily be granted

in the exercise of discretion. *See generally id.* at 494; *Matter of Blas*, 15 I&N Dec. 626 (BIA 1974); *Matter of A-M-*, 25 I&N Dec. 66 (BIA 2009).

IX. **Typical Contents of Adjustment Application**

A. The following documents will usually be found in the ROP:

1. Visa Petition Approval Notice (Form I-797) – indicates the category of immigration, such as immediate relative or in the case of a preference immigrant, it shows the priority date
2. Application for Adjustment of Status (Form I-485)
3. Identity Documents (ex. marriage certificate and U.S. birth certificate from petitioning spouse) – shows the relationship between the applicant and the petitioning relative
4. Affidavit of Support (Form I-864 in family-based cases) – accompanied by tax returns and identity documents of the sponsor
5. Copy of Passport/I-94 or Form I-485A (with $1,000 penalty pursuant to INA § 245(i))
6. Medical Evaluation – conducted by recognized provider
7. Waiver Application (Form I-601) – if applicable
8. Receipts for Payment of Filing Fees – unless there is a fee waiver

X. **Waivers/Solutions with Coinciding Grounds of Inadmissibility**

A. <u>Crimes</u>

1. Waiver Under INA § 212(h)
   a. Available for the following criminal grounds of inadmissibility:
      i. INA § 212(a)(2)(A)(i)(I) – CIMT
      ii. INA § 212(a)(2)(A)(i)(II) – Controlled Substance Offense (insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana)
      iii. INA § 212(a)(2)(B) – Multiple Criminal Convictions (with aggregate sentences to confinement of 5 years or more)
      iv. INA § 212(a)(2)(D) – Prostitution and Commercialized Vice
      v. INA § 212(a)(2)(E) – Certain Aliens Involved in Serious Criminal Activity Who Have Asserted Immunity from Prosecution
   b. 3 Ways to Qualify:
      i. Hardship – INA § 212(h)(1)(B)
         - Most common route
         - Requires that the applicant be the spouse, parent, son, or daughter of a USC or LPR who would suffer extreme hardship if the application were denied.
            - Factors include: (1) presence of LPR/USC family ties in the U.S.; (2) the qualifying relative's family ties outside of the U.S.; (3) country conditions in the country of relocation and the qualifying relative's ties to that country; (4) the financial impact of departure; (5) significant health conditions, particularly when tied to unavailability of suitable medical care in the country of

relocation. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 566 (BIA 1999)

- Waiver is discretionary, so balancing favorable and unfavorable factors is necessary. (See 212(c) discussion for brief discussion of factors to be balanced)
- Burden on the applicant to prove relationship to the qualifying relative.
- Irrelevant if applicant may suffer <u>extreme hardship</u>; only hardship onto the qualifying relatives matters.

ii. Rehabilitation – INA § 212(h)(1)(A)

- If the applicant does not have a qualifying relative that would suffer extreme hardship, he or she could attempt the rehabilitative route.
- Requires that the applicant show that:
  - The criminal activities for which he/she is inadmissible occurred more than 15 years ago (if sole ground of inadmissibility is under INA § 212(a)(2)(D), the 15-year requirement does not apply);
  - Admission of this individual (or approval of AoS) would not be contrary to the national welfare, safety, and security of the U.S.; and
  - He/she has been rehabilitated.

iii. VAWA Self-Petitioners – INA § 212(h)(1)(C)

c. Heightened Standard

i. "Violent or dangerous crimes" under INA § 212(a) trigger the heightened standard.

ii. Heightened Standard – denial of the application would result in <u>exceptional and extremely unusual hardship</u>

- Hardship Factors:
  - The heightened standard shares the same level of hardship as found in cancellation of removal for nonpermanent residents. *Compare* 8 C.F.R. § 1212.7(d) *with* INA § 240A(b)(1).
  - "Exceptional and extremely unusual hardship" is hardship substantially beyond that which would ordinarily result from a respondent's removal. *See Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 59 (BIA 2001) (en banc). Factors to be considered in determining the level of hardship include age, health, length of residence in the United States, special educational needs, and family and community ties in the United States and abroad. *Id.* at 63; *Matter of Anderson*, 16 I&N Dec. 596, 597 (BIA 1978). A lower standard of living, diminished educational opportunities, poor economic conditions, linguistic barriers, and other adverse country conditions in the country of removal are also relevant factors, but will generally be insufficient, in and of themselves, to support a finding of exceptional and extremely unusual

hardship. *Monreal-Aguinaga*, 23 I&N Dec. at 63–64; *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 323–24 (BIA 2002).

- Note: Regulations do not specify to whom. The Ninth Circuit has clarified that it includes hardship to both the applicant and qualifying relatives. *See Rivera-Rivera v. Holder*, 684 F.3d 906, 910 (9th Cir. 2012). It also held that this heightened standard does not alter the extreme hardship required for the threshold eligibility under the hardship route. *See Mejia v. Gonzales*, 499 F.3d 991, 996 (9th Cir. 2007). Rather, it supplements the threshold eligibility requirements with another layer of required hardship and applies both to waivers under the hardship route and the rehabilitation route in cases involving a violent or dangerous crime. *See id.*

d. Note:
   i. This waiver does not waive most drug crimes. The only controlled substance offense that it waives is one offense for simple possession.
   ii. Waiver not available for those that have committed murder and torture, or for attempt or conspiracy to commit these acts.
   iii. Waiver not available to an individual who has previously been "admitted" as a permanent resident, if, since the date of such "admission," the individual:
      - Has been convicted of an aggravated felony; or
      - Has not lawfully resided continuously in the U.S. for 7 years preceding the initiation of removal proceedings. – INA § 212(h)(2)

e. Recurring issue in litigation: Whether "admission" applies to an alien who acquired permanent residence through AoS (without leaving U.S.), or whether this limitation only applies to those who were physically admitted into the U.S. with an immigrant visa or after already having been granted permanent residence.
   i. Traditionally, the Board held that AoS is an admission; however, the Board reversed itself in response to multiple circuit court decisions to the contrary. Now, AoS is not an "admission" in the context of INA § 212(h) and, therefore, the waiver remains available to LPRs who acquired their status by AoS rather than admission at a port of entry. Now, these LPRs who have been convicted of an aggravated felony may qualify for a 212(h) waiver, provided they meet all other criteria. *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015).

2. Stand-Alone 212(h) Waiver for Permanent Residents with Crimes
   a. In limited circumstances, an LPR may apply for a 212(h) waiver without filing an accompanying application for adjustment.
   b. Limited to cases in which the LPR is charged as an "arriving alien" on the notice to appear. *See Matter of Chavez-Alvarez*, 26 I&N Dec. 274, 282 (BIA 2014).

c. Benefits: Simpler and does not delay the removal proceeding by not requiring the re-filing of a visa petition with USCIS or the re-filing of an application for AoS.
d. The eligibility criteria for a stand-alone 212(h) waiver are the same as those described above.

B. Fraud & Misrepresentation
1. Waiver Under INA § 212(i)
a. Waives inadmissibility under INA § 212(a)(6)(C)(i) (fraud or willful misrepresentation of a material fact).
b. Waiver requires a qualifying relative who would suffer extreme hardship if the waiver were to be denied.
i. Qualifying Relatives: USC/LPR spouse or parent
ii. Note: This is a more restrictive list of qualifying relatives than that discussed above for a 212(h) waiver in that it does not include USC/LPR sons or daughters. Thus, a parent of a USC/LPR with no other qualifying relative cannot apply for a 212(i) waiver.
iii. Exception: VAWA self-petitioners can show extreme hardship to a USC/LPR parent, child, or to the petitioner him/herself.
c. Note: This waiver does not forgive a false claim to U.S. citizenship.

C. Waiver Under INA § 212(c) – "*And if thou gaze long into 212(c), 212(c) will also gaze into thee.*" – Friedrich Nietzsche
1. This is an old form of relief, which was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), but which continues to be revived and expanded by case law. Cancellation of Removal for Certain Permanent Residents was meant to replace relief under 212(c). In short, this waiver is still available to long-term permanent residents to waive criminal convictions. A breakdown of the eligibility can be found below.
2. General Requirements for Eligibility - 8 C.F.R. § 1212.3(f)
a. Lawful Permanent Residence status
b. 7 consecutive years of lawful unrelinquished domicile
c. Not subject to the grounds of inadmissibility under INA § 212(a)(3)(A) (Security and Related Grounds), (B) (Terrorist Activities), (C) (Foreign Policy), (E) (Nazis), or INA § 212(a)(10)(C) (International Child Abduction)
d. Merits favorable exercise of Court's discretion
3. Specialized Eligibility Consideration Based on Timing of Conviction
a. Conviction or Plea on or After April 1, 1997
i. 212(c) relief not available.
b. Conviction or Plea Between April 24, 1996, and April 7, 1997
i. Convictions that make an applicant deportable under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) § 440 render him or her ineligible for 212(c) relief.
- AEDPA § 440(d) – Severely restricted former INA § 212(c) to bar waivers for applicants convicted of most crimes, including those who had aggravated felonies (regardless of the length of their sentences),

or those with convictions for controlled substances offenses, drug addiction or abuse, firearms offenses, two crimes of moral turpitude, or miscellaneous crimes relating to national security.

c. Conviction or Plea Between November 29, 1990, and April 24, 1996
   i. Aggravated felony convictions for which an aggregate term of imprisonment of 5 years is served renders an applicant ineligible.
   ii. AEDPA limitations do not apply.
      - Note: AEDPA also expanded the definition of an aggravated felony, but this expanded definition CAN be applied retroactively. This is separate and not to be confused with the 5-year aggravated felony bar, which does not apply retroactively.
         - Also: If the applicant is in immigration proceedings prior to April 24, 1996, AEDPA does not apply, regardless of the date of conviction.

d. Conviction or Plea Prior to November 29, 1990
   i. The 5-year aggravated felony bar does not apply.
   ii. AEDPA limitations do not apply.

4. Discretion: Balancing Equities – *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978)
   a. Factors include:
      i. Family ties, residence of long duration, hardship to the applicant and family, service in the U.S. armed forces, employment history, property or business ties, service to the community, rehabilitation, and evidence of good character. *Id.* at 584–85.
5. Suggested Reading
   a. 8 C.F.R. § 1212.3(f)–(h) – providing a basic eligibility framework for 212(c) relief
   b. *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014)
   c. *Judulang v. Holder*, 132 S. Ct. 476 (2011)
   d. *INS v. St. Cyr*, 533 U.S. 289 (2001)

D. Unlawful Presence Waivers
1. Unlawful Presence Bars:
   a. 3-Year Bar: when an individual accumulates more than 180 days, but less than 1 year, of unlawful presence, departs the U.S., and seeks to reenter (or adjust status) – INA § 212(a)(9)(B)(i)(I)
   b. 10-Year Bar: when an individual accumulates 1 year or more of unlawful presence, departs the U.S., and seeks to reenter (or adjust status) – INA § 212(a)(9)(B)(i)(II)
   c. 10-Year Bar After Reentry: when an individual reenters, or attempts to reenter, without inspection after accumulating I year of unlawful presence OR after being deported – INA § 212(a)(9)(C)(i)
      i. Note: If reentry was prior to April 1, 1997, the bar does not apply.
2. Waiver Under INA § 212(a)(9)(B)(v)
   a. Waives: 3/10 year unlawful presence bars under INA § 212(a)(9)(B)(i)(I)–(II)
   b. Standard: Extreme hardship to qualifying relative.

c. Qualifying Relatives: USC/LPR spouse or parent
    i. Note: Although hardship to a child may not be considered directly because the statute provides for hardship to spouse/parents only, the child's condition is considered as hardship to the USC/LPR spouse.
3. Waivers Under INA § 212(a)(9)(C)(ii)–(iii)
    a. Note: The Immigration Judge does not have jurisdiction over these waivers; only DHS.
    b. Waiver Under § 212(a)(9)(C)(ii) – only available 10 years since the applicant's last departure from the U.S. at the Secretary of Homeland's Security's discretion.
    c. Waiver Under § 212(a)(9)(C)(iii) – only available for VAWA self-petitioners if there is a connection between the battering/extreme cruelty the petitioner suffered and the petitioner's removal/departure/reentry.

E. <u>Public Charge & Affidavits of Support</u>
1. INA § 212(a)(4)(A) – "Any alien who, in the opinion . . . of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible."
    a. Factors – INA § 212(a)(4)(B)
        i. Age, health, family status, assets, resources, financial status, education, and skills
2. Form I-864, Affidavit of Support – INA § 213A
    a. To adjust status, an applicant must submit an affidavit of support by a sponsor.
    b. The affidavit is generally sufficient to overcome the public charge ground of inadmissibility, but it is not guaranteed.
    c. These affidavits constitute a binding contract between the sponsor and the U.S. government. INA § 213A.
    d. Sponsor(s) must show that they can support the applicant 125% above the poverty level as shown in the Poverty Guidelines, which are contained at the end of the form.
    e. Exemptions:
        i. Usually not required in employment-based cases, unless a relative filed the I-140 petition or where the relative has a significant ownership interest in the entity that filed the petition. INA § 212(a)(4)(D).
        ii. Not required for diversity immigrants, special immigrants, VAWA self-petitioners, refugees and asylees adjusting status, Cuban adjustment applicants, registrants under INA § 249, and persons who have earned or can be credited with 40 quarters of coverage pursuant to SSA regulations.
        iii. Individuals who have earned 40 quarters of coverage pursuant to SSA regulations, intending immigrant children who will become USCs by virtue of the Child Citizenship Act of 2000, or VAWA self-petitioners instead file a Form I-864W.